Petrodar Operating Co Ltd v Nam Fatt Corp Bhd & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02(IM)-2196 OF 2010 AND W-02(IM)-2198 OF 2010
RAMLY ALI, CLEMENT SKINNERAND AZIAH ALI JJCA
2 JULY 2012

Civil Procedure — Jurisdiction — Forum conveniens — Dispute — Tort — Pending arbitration — Injunction for arbitration — Application to set aside dismissed — Either party not within Malaysia — Whether Malaysia proper forum for proceedings — Whether action should be set aside

The appellant was an off-shore company incorporated in British Virgin Islands with an office in Sudan. The first respondent was a public listed company listed with Bursa Malaysia while the second respondent was its subsidiary. The second defendant, on the other hand, was not a party in the present appeals. Through a joint-venture company ('the JV'), the second respondent entered into a contract with the appellant, the owner of the project, for the construction of part of the works in Sudan. The second respondent then issued a performance guarantee, carried out by the second defendant in Malaysia, worth of USD18m for the appellant and as a security, the first respondent provided a fixed deposit of RM20m and a piece of land. Dispute arose between the JV and the appellant when there was a refusal of certification or payment and interference of the JV's execution of works by the appellant. As prescribed by the contract, the respondent referred the disputes to arbitration. It was alleged that the appellant repeatedly threatened to make a call on the guarantee which the respondent viewed as an intention to abuse guarantee. The appellant subsequently invited the JV to negotiate for settlement and pending settlement, JV requested the second defendant to extend the guarantee. The respondents obtained an injunction pursuant to s 176 of the Companies Act 1965 which restrained the appellant from enforcing the guarantee. The appellant then purported a call on the guarantee and this act was regarded by the respondents as fraudulent under Malaysian and Sudanese laws. The appellant went on to apply to set aside the service of writ and for a stay of proceedings pending reference to arbitration which was dismissed. Consequently, the appellant file an application to set aside the interim injunction and this was also dismissed. In the present appeal, the appellant contended that; the court has no jurisdiction in the respondent's claim as the appellant was not within Malaysia; the second defendant should not have been joined as a party as there was no cause of action against it; and alternatively, the

present action should be set aside since Malaysia was not the proper forum for the proceedings.

Held, dismissing both appeals with costs:

(1) The appellant had not submitted, succumbed nor surrendered to the jurisdiction of the court merely because they had objected to the ad interim injunction. The second defendant had a place of business in Kuala Lumpur. The alleged fraudulent and/or unconscionable demand to the second defendant was made in Malaysia which required the second defendant to make payment through Malaysian bank through telegraphic transfer. The High Court had jurisdiction to hear the respondent's claim as it was premised on a fraudulent demand and was cast in tort, committed in Malaysia (see paras 17 & 19).

(2) The defendant had applied to set aside the leave granted ex parte earlier to the respondents to issue and serve the writ of summons out of jurisdiction. The High Court had the discretion to decide whether or not to hear the case. It would be unjust to confine the respondents to remedies elsewhere (see para 27).

(3) Although the instructions to make the demand originated from the appellant, the purported fraudulent and/or unconscionable demand was made in Malaysia, at the second defendant's office. Both the respondents were in Malaysia and the evidence from witnesses on the issues of the fact would be more readily available in Malaysia, making a trial in Malaysia more convenient (see para 30).

(4) The second defendant ought to be made a party in this action as the declaratory orders sought against the second defendant would affect the rights of the appellant. Further, it had entered unconditional appearance and had not sought to strike out the respondent's claim (see para 31).

(5) The court had jurisdiction whether or not to grant ad interim injunction to preserve the status quo pending the inter parte hearings. The appellant made calls on the guarantee despite parties being in negotiations for settlement and despite the JV had acceded to the appellant's request by asking for the guarantee to be renewed pending settlement negotiations. The demand was made as a tool of oppression. The court below did not err in exercising its discretion by not setting aside the ad interim injunction pending the hearing inter parte (see paras 33 & 35).

[Bahasa Malaysia summary

Perayu merupakan syarikat luar pesisir yang diperbadankan di British Virgin Islands dengan sebuah pejabat di Sudan. Responden pertama merupakan sebuah syarikat tersenarai awam manakala responden kedua adalah anak syarikatnya. Defendan kedua, sebaliknya, bukan merupakan pihak dalam

rayuan ini. Melalui sebuah syarikat usahasama ('US'), responden kedua memeterai kontrak dengan perayu, pemilik projek, bagi pembinaan sebahagian daripada kerja-kerja di Sudan. Responden kedua kemudiannya mengeluarkan jaminan prestasi, yang dijalankan oleh defendan kedua di Malaysia, bernilai USD18 juta bagi perayu dan sebagai cagaran, responden pertama menyediakan deposit tetap RM20 juta dan sebidang hartanah. Pertikaian timbul di antara usahasama dan perayu apabila terdapat keengganan pensijilan dan gangguan perlaksanaan kerja-kerja US oleh perayu. Seperti yang ditetapkan oleh kontrak, responden merujuk pertikaian tersebut kepada timbangtara. Perayu didakwa berulangkali mengugut untuk membuat tuntutan ke atas jaminan di mana responden melihat tindakan tersebut merupakan niat untuk menyalahgunakan jaminan. Perayu kemudiannya menjemput US untuk berbincang untuk penyelesaian dan sementara menunggu penyelesaian, US diminta oleh defendan kedua untuk melanjutkan jaminan. Responden-responden mendapatkan satu injunksi menurut s 176 Akta Syarikat 1965 yang menahan perayu daripada menguatkuasakan jaminan. Perayu kemudiannya membuat tuntutan ke atas jaminan dan tindakan ini dianggap sebagai penipuan oleh responden-responden di bawah undang-undang Malaysia dan Sudan. Perayu terus memohon untuk mengetepikan penyerahan writ dan untuk penangguhan prosiding sementara merujuk kepada timbangtara, yang kemudiannya ditolak. Berikutnya, perayu memfailkan satu permohonan untuk mengetepikan injunksi interim dan permohonan ini juga ditolak. Di dalam rayuan ini, perayu menghujah bahawa, mahkamah tidak mempunyai bidang kuasa dalam tuntutan responden memandangkan perayu tidak berada di dalam Malaysia; defendan kedua tidak seharusnya disertakan sebagai pihak memandangkan tidak terdapat kausa tindakan terhadapnya; dan secara alternatifnya, tindakan ini perlu diketepikan memandangkan Malaysia bukan merupakan tempat yang sesuai untuk prosiding tersebut

Diputuskan, menolak kedua-dua rayuan dengan kos:

(1) Perayu tidak menghujah, tunduk atau berserah kepada bidang kuasa mahkamah hanya disebabkan mereka membantah kepada injunksi ad interim. Defendan kedua mempunyai tempat perniagaan di Kuala Lumpur. Penipuan yang didakwa dan/atau tuntutan yang tidak sepatutnya kepada defendan kedua dibuat di Malaysia di mana memerlukan defendan kedua untuk membuat bayaran melalui bank Malaysia melalui pindahan telegraf. Mahkamah Tinggi mempunyai bidang kuasa untuk mendengar tuntutan responden memandangkan ia berpremiskan permintaan penipuan dan berdasarkan tort, dilakukan di Malaysia (lihat perenggan 17 & 19).

(2) Defendan memohon untuk mengetepikan kebenaran yang diberikan secara ex parte pada awalnya kepada responden-responden untuk mengeluarkan dan menyerahkan writ saman di luar bidang kuasa.

Mahkamah Tinggi mempunyai budi bicara untuk memutuskan sama ada untuk tidak mendengar kes tersebut. Adalah tidak adil untuk membataskan responden-responden kepada remedi-remedi di tempat lain (lihat perenggan 27).

(3) Walaupun arahan-arahan untuk membuat tuntutan pada asalnya daripada perayu, penipuan yang didakwa dan/atau permintaan tidak sepatutnya dibuat di Malaysia, di pejabat defendan kedua. Kedua-dua responden berada di Malaysia dan keterangan daripada saksi-saksi atas isu-isu fakta terdapat di Malaysia, menjadikan perbicaraan di Malaysia lebih mudah (lihat perenggan 30).

(4) Defendan kedua seharusnya dijadikan pihak kepada tindakan ini memandangkan perintah deklarasi yang dituntut terhadap defendan kedua akan menjejaskan hak-hak perayu. Lebih-lebih lagi, defendan kedua telah memasukkan kehadiran tanpa syarat dan tidak menuntut untuk mengetepikan tuntutan responden (lihat perenggan 31).

(5) Mahkamah mempunyai bidang kuasa sama ada untuk tidak membenarkan injunksi ad interim bagi mengekalkan sebagaimana keadaan sebelumnya sementara pendengaran inter parte. Perayu membuat tuntutan ke atas jaminan meskipun pihak-pihak sedang berbincang untuk mendapatkan penyelesaian dan walaupun US telah menurut permintaan perayu yang meminta jaminan diperbaharui sementara perbincangan penyelesaian. Permintaan yang dibuat merupakan satu alat penindasan. Mahkamah tidak terkhilaf dalam menjalankan budi bicaranya dengan tidak mengetepikan injunksi ad interim sementara pendengaran inter parte (lihat perenggan 33 & 35).]

Notes

For cases on forum conveniens, see 2(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 4917–4931.

Cases referred to

American Express Bank Ltd v Mohamad Toufic Al-Ozeir & Anor [1995] 1 MLJ 160; [1995] 1 CLJ 273, SC (refd)

Bocoltra Construction Pte Ltd & Ors v Attorney General (No 2) [1995] 2 SLR 733, CA (refd)

Focal Asia Sdn Bhd & Anor v Raja Noraini bt Raja Datuk Nong Chik & Anor [2009] MLJU 1688; [2009] 1 LNS 913, HC (refd)

Globus Shipping & Trading Co (Pte) Ltd v Taiping Textiles Sdn Bhd [1976] 2 MLJ 154; [1976] 1 LNS 31, FC (refd)

Harrah's Operating Co Inc (Trading as Harrah's Casino Hotel Lake Tahoe & Bill's Lake Tahoe Casino) v Wu Yun Shya Josephine and another appeal [2008] 4 MLJ 63; [2008] 5 CLJ 251, CA (refd)

Kejuruteraan Bintai Kindenko Sdn Bhd v Nam Fatt Construction Sdn Bhd & Anor [2011] 7 CLJ 442, CA (refd)
RIH Services (M) Sdn Bhd v Tanjung Tuan Hotel Sdn Bhd [2002] 3 MLJ 1; [2002] 3 CLJ 83, CA (refd)
Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd [1994] 2 MLJ 97; [1994] 2 CLJ 716, SC (refd)
Sumatec Engineering And Construction Sdn Bhd v Malaysian Refining Co Sdn Bhd [2012] 4 MLJ 1; [2012] 3 CLJ 401, FC (refd)

Legislation referred to

Arbitration Act 2005 s 11(1)
Companies Act 1965 s 176
Courts of Judicature Act 1964 s 23
Merchant Shipping Ordinance 1952 s 251
Rules of the High Court 1980 O 11 rr 1, 1(h), (i), (j), O 29

K Nayagam (Janice Tay with him) (Skrine) for the appellant.
Tee Geok Hock (GH Tee & Co) for the respondents.

Aziah Ali JCA (delivering judgment of the court):

[1] We heard two appeals filed by the appellant (the first defendant in the court below). Civil Appeal No W-02(IM)-2198 of 2010 was the appellant's appeal against the decision of the learned judicial commissioner dismissing the appellant's application to set aside the concurrent writ of summons, notice of writ to be served out of the jurisdiction and the order dated 15 April 2010 giving leave to the respondents (the plaintiffs in the court below) to serve the notice of the concurrent writ and the service of the concurrent writ (encl 35). Civil Appeal No W-02(IM)-2196 of 2010 was the appeal against the decision of the learned judicial commissioner dismissing the appellant's application to set aside, or alternatively discontinue, the ad interim injunction granted on 3 May 2010 (encl 43).

[2] We had considered the submissions made and perused the appeal records and by a unanimous decision we dismissed both appeals with costs of RM30,000 to the respondents for both appeals and the deposit to the respondents towards costs.

BACKGROUND

[3] The background facts have been laid out succinctly in the grounds of judgment of the learned judicial commissioner. For the purpose of these appeals we reproduce the salient facts. The first respondent is a public listed company listed with Bursa Malaysia. The second respondent is a subsidiary of

the first respondent. The appellant is an off-shore company incorporated in British Virgin Islands and having its registered office in Khartoum, Sudan. The second defendant in the court below is an off-shore bank in Labuan. The second defendant was not a party in these appeals.

[4] The second respondent through the vehicle of Bentini-NF Energy JV, a joint venture company with one Italian company Bentini SpA ('the JV'), had entered into a contract with the appellant for the construction of part of the works in a project in Sudan known as 'Engineering, Procurement, Construction and Commissioning of Pumping Facilities' ('the project') in the Melut Basin Oil Development Project at the contract price of USD180m ('the contract'). The appellant was the owner of the project. The contract provides that it shall be governed by and construed in accordance with the laws of the Republic of Sudan.

[5] The second respondent had issued a performance guarantee ('guarantee') for USD18m in favour of the appellant. As collateral for the issuance of the said guarantee, the first respondent had at the request of the second respondent, provided to the second defendant securities in the form of fixed deposit of RM20m and a piece of land. The guarantee was issued by the second defendant in Kuala Lumpur.

[6] Disputes arose between the JV and the appellant regarding claims for variation works done and changes to the JV's original works which the respondents claim the appellant had refused to certify or pay. It was also alleged that the appellant had committed many acts of interference in the JV's execution of the works. The respondents have instructed solicitors to prepare and refer the disputes to arbitration as provided for under condition 55.2 of the contract.

[7] According to the respondents in May 2007 the JV was informed by its site staff that the appellant's representative had threatened to make a call on the guarantee which the JV alleged was an abuse of the guarantee and made in bad faith. It was alleged that despite the respondents' agreement to renew the guarantee, on 26 February 2009 the appellant had sent its staff to the second defendant bank in Kuala Lumpur with threats of making demand on the guarantee. The respondents aver that this showed that the appellant had intention to abuse the guarantee and to make fraudulent and/or unconscionable demand on the guarantee. On 25 August 2009 the appellant again sent its staff to the second defendant's Kuala Lumpur office with threat of making demand on the second guarantee. On or about 1 December 2009 the JV wrote to the second defendant to inform the second defendant that any

claim or demand under the guarantee made by the appellant would be fraudulent, unconscionable and/or invalid and that the second defendant should not accede to it.

[8] Towards the end of 2009 the appellant had invited the JV to negotiate for settlement and pursuant to this, by letter dated 3 February 2010 the JV requested the second defendant to extend the guarantee pending negotiation for amicable settlement. On 18 March 2010 the respondents obtained an ad interim restraining order pursuant to s 176 of the Companies Act 1965 from the Shah Alam High Court which restrains the appellant by themselves or by their servants agents from taking any action to enforce the guarantee or from taking any proceedings whatsoever or from appointing receivers or managers under the security except with leave of court. According to the respondents despite the fact that the JV had acceded to the appellant's request by asking for the guarantee to be renewed pending settlement negotiations, unknown to them, on 8 April 2010 the appellant had sent its staff to the second defendant bank purportedly to demand extension of the guarantee. The appellant had also faxed a letter dated 8 April 2010 to the JV stating amongst others that the purported demand was to get the second defendant to issue a replacement performance guarantee for another six months. By letter dated 8 April 2010 the JV notified the second defendant that the appellant's purported demand dated 8 April 2010 is fraudulent, unconscionable and/or invalid and the second defendant should not accede to it and any payment the second defendant would make after having been notified of the appellant's fraud in the demand would render such payment fraudulent and/or breach of contract or duty.

[9] The respondents claimed that the purported call on the guarantee or making or intending to make a call on the guarantee was fraudulent and/or unconscionable under the laws of Malaysia as well as under the laws of Sudan. According to the respondents a claim or payment made under the guarantee would cause the respondents to suffer irreparable damage which cannot be compensated by monetary compensation because their commercial reputation as contractor in the building industry would be damaged and the banks would withdraw or freeze the loans and facilities given to the respondents. This would result in the respondents being unable to proceed with the other projects it had undertaken.

[10] By way of the amended statement of claim, the respondents prayed for amongst others an injunction to restrain the appellant from calling or demanding on the guarantee and/or from receiving any proceeds of monies under the guarantee. On 13 April 2010 the respondents obtained an ex parte injunction to restrain the appellant from receiving the money under the guarantee. The date for the inter partes hearing was fixed for 3 May 2010. However parties were absent for the inter partes hearing and the learned

judicial commissioner re-scheduled the hearing to 3 June 2010 and made an ad interim injunction order to preserve the status quo until disposal of the inter partes hearing. On 3 June 2010 again parties were absent and the court rescheduled the inter partes hearing to 16 June 2010.

[11] On 15 April 2010 the respondents obtained leave to issue notice of concurrent writ for service, service of the ex parte injunction order and related cause papers on the appellant out of jurisdiction. On 7 June 2010 the appellant filed conditional appearance. On 16 June 2010 the appellant filed the application to set aside the service of the writ and for a stay of proceedings pending reference to arbitration (encl 35). The learned judicial commissioner dismissed the application to set aside but allowed the stay. The appellant subsequently filed the application to set aside the ad interim injunction (encl 43). This was also dismissed by the learned judicial commissioner. Hence these two appeals before us. At the hearing of the appeals we were informed by learned counsel for the respondents that pursuant to the inter partes hearing the ad interim injunction had been set aside.

CIVIL APPEAL NO W-02(IM)-2198 OF 2010 (ENCLOSURE 35)

[12] The appellant relied on s 23 of the Courts of Judicature Act 1964 ('the CJA') in support of its application to set aside the concurrent writ of summons, notice of writ to be served out of the jurisdiction and the order dated 15 April 2010 giving leave to serve the notice of the concurrent writ and the service of the concurrent writ. Section 23 provides as follows:

> (1) Subject to the limitations contained in Article 128 of the Constitution the High Court shall have jurisdiction to try all civil proceedings where —
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> (a) the cause of action arose;
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> (b) the defendant or one of several defendants resides or has his place of business;
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> (c) the facts on which the proceedings are based exist or are alleged to have occurred; or
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> (d) any land the ownership of which is disputed is situated,
>
> within the local jurisdiction of the Court and notwithstanding anything contained in this section in any case where all parties consent in writing within the local jurisdiction of the other High Court.
>
> (2) Without prejudice to the generality of subsection (1), the High Court shall have such jurisdiction as was vested in it immediately prior to Malaysia Day and such other jurisdiction as may be vested in it by any written law in force within its local jurisdiction.

[13] The grounds upon which the appellant relied on are as follows:

(a) the court lacks jurisdiction over the subject matter of the respondents' claim;

(b) the appellant is not resident within Malaysia nor does it have its place of business within Malaysia, and does not submit to the court's jurisdiction, and

(c) the second defendant bank ought never to have been joined as a party as there is no cause of action against it.

Alternatively it was submitted that in the event the court decides it had jurisdiction, this action ought still to be set aside as Malaysia is not a proper forum and proceedings in Malaysia would give rise to multiplicity of proceedings.

[14] Before the learned judicial commissioner, it was submitted for the appellant that the contract was performed in Sudan and subject to Sudanese law (condition 56.1 of the contract). With regard to the dispute on the performance guarantee it was submitted that parties had agreed that it shall be governed by and construed according to the laws of Sudan and the surety agreed to submit to the non-exclusive jurisdiction of the courts in Sudan (item no 8 of the 'Form of Contractor's Performance Guarantee'). The respondents on the other hand contended that the appellant had submitted to the jurisdiction of the Malaysian court by filing affidavits and by making various applications and by accepting from the respondents the quarterly interest payments as ordered by the learned judicial commissioner as a condition for the granting of the stay order. These payments are retained by the appellant's solicitors.

Jurisdiction

[15] The learned judicial commissioner decided that the Malaysian court had jurisdiction in this case. In making his decision that the Malaysian court has jurisdiction, we find that the learned judicial commissioner had referred to the following facts pleaded by the respondents in the statement of claim:

(a) the subject matter of this suit is a performance guarantee issued by the second defendant in Kuala Lumpur;

(b) the second defendant is a Malaysian company having its place of business in Kuala Lumpur;

(c) it was the first plaintiff, at the request of the second plaintiff, who caused the second defendant to issue the performance guarantee;

(d) the first defendant made a purported demand on the performance bond in Kuala Lumpur;

(e) it is the plaintiffs' case that the first defendant's purported demand was fraudulent or unconscionable;

(f) it is also the plaintiffs' case that the first defendant, by making the purported demand in calling upon the bond, committed a tort of fraud in the circumstances, and that the second defendant owed a duty of care towards the plaintiffs to ensure that any call made by the first defendant on the guarantee was not made fraudulently and/or unconscionably;

(g) on or about 1 December 2009 the JV brought the fraud or unconscionability to the notice of the second defendant;

(h) the second defendant also had direct knowledge of the two previous incidents where the first defendant made purported demands on the previous guarantee for the ulterior motive or oppressive purpose of exerting pressure upon the second defendant to immediately renew the guarantee;

(i) the Shah Alam High Court restraining order dated 8 March 2010 was also brought to the attention of the second defendant but the second defendant did not appear to be bothered about the restraining order. This restraining order had been extended to 9 July 2010;

(j) it is the plaintiffs' case that in the circumstances of this case, a demand or claim of the first defendant towards the guarantee would be fraudulent, unconscionable and/or invalid under the law; and

(k) it is also the plaintiffs' case that the first defendant's demand or call on the guarantee is fraudulent, unconscionable and/or invalid in the circumstances of the project, and/or the demand was made as a tool or means of oppression or vexation against the respondents. Moreover the second defendant's act of paying under the circumstances would render it privy to the fraud and/or would be tainted by fraud and/or unconscionability.

[16] The learned judicial commissioner had also considered the reliefs claimed by the respondents in the amended statement of claim which amongst others are as follows:

(a) a declaration that on the facts and circumstances of or pertaining to the project, the purported call or demand dated 8 April 2010 which was made by the first defendant on the guarantee is fraudulent and/or unconscionable, and is therefore null and void;

(b) a declaration that on the facts and circumstances of the case, the first

defendant's purported demand on the guarantee was prohibited by the ad interim order dated 13 March 2010 and/or was in contempt of court or in contravention of the court order;

(c) an injunction to restrain the first defendant from calling or demanding on the guarantee and/or further to restrain the first defendant from receiving any proceeds of monies under the guarantee pursuant to the purported call or demand dated 8 April 2010;

(d) a declaration that the second defendant, having been informed of the relevant facts and circumstances of the project which relates to the fraud or intended fraudulent demand on the part of the first defendant, would be a party or privy to the fraud if the second defendant were to make payment pursuant to the first defendant's demand;

(e) a declaration that the second defendant, having been notified of the relevant facts and circumstances of the project which relate to the fraud or intended fraudulent demand on the part of the first defendant, would be acting unlawfully or improperly or mala fide if the second defendant were to make payment pursuant to the first defendant's demand and that in such event the second defendant would not be entitled to recover the payment or any part thereof from the plaintiffs; and

(f) a declaration that the second defendant, having been informed of the ad interim order dated 18 March 2010, would be acting in contempt of court or in contravention of the said court order if the second defendant were to proceed to make payment pursuant to the first defendant's demand and that in such event the second defendant would not be entitled to recover the payment or any part thereof from the plaintiffs.

[17] We are unable to agree with counsel for the respondents that the appellant had by conduct submitted to the court's jurisdiction. We agree with the learned judicial commissioner who had decided that, on the authority of *Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 MLJ 97; [1994] 2 CLJ 716 the appellant had not submitted, succumbed nor surrendered to the jurisdiction of the court merely because they had objected to the ad interim injunction.

[18] The case of *American Express Bank Ltd v Mohamad Toufic Al-Ozeir & Anor* [1995] 1 MLJ 160; [1995] 1 CLJ 273 cited by the learned judicial commissioner, the appellant/defendant was a foreign bank carrying on business in Singapore. The respondents/plaintiffs who were residents in Malaysia were customers of the foreign bank in connection with foreign exchange dealings or transactions. The respondents/plaintiffs filed a suit alleging that the foreign bank had acted in 'fraudulent breach of a fiduciary duty.'. The learned deputy registrar granted leave to issue and to serve the said

notice of writ of summons out of jurisdiction on the foreign bank. The foreign bank filed a conditional appearance and a further application for the order of the learned deputy registrar to be set aside and for a further order that the said notice of writ of summons itself and the service of the same to be also set aside with costs. For the foreign bank it was argued firstly, that the subject matter of claim was in contract. Secondly, all the foreign exchange transactions and other things took place outside Malaysia, except for the instructions and information from the foreign bank to the bank customers, which were received by the bank customers in Kuala Lumpur and acted on by them in Kuala Lumpur. Thirdly both agreements had provided for all disputes between the parties to be adjudicated in Singapore. Thus the two issues before the High Court was (a) whether the Malaysian High Court had jurisdiction to hear the action filed, and (b) whether the Malaysian High Court was or was not a *forum non conveniens*. The High Court judge decided amongst others that the tort of fraudulent and negligent misrepresentation when made by the telephone or telex was committed at the place where the message was received and acted on, and not the place from which it was sent. His Lordship held that the High Court had jurisdiction in this matter to entertain the claim. The Supreme Court agreed with the view of the learned judge. Peh Swee Chin SCJ in his judgment said, inter alia:

> In a case like the present one, involving some foreign elements, the question that normally first of all arises, is whether our courts have jurisdiction ie power to deal with the case.

[19] In the present case it was not disputed that the first respondent is a public-listed company in Malaysia and the second respondent is its subsidiary. The guarantee was issued by the second defendant upon the request made by the second respondent to the first respondent. The second defendant has a place of business in Kuala Lumpur. The alleged fraudulent and/or unconscionable demand to the second defendant was made in Malaysia which required the second defendant to make payment through Malaysian bank by telegraphic transfer. Based on the authority of *American Express Bank Ltd* wherein the Supreme Court stated that the claim of fraudulent misrepresentation is a tort, the learned judicial commissioner found that the respondents' claim was premised on a fraudulent demand and 'was cast in tort' and it was committed in Malaysia. On the facts we agree with the learned judicial commissioner that the High Court has jurisdiction to hear the respondents' claim.

Order 11 r 1 of the RHC

[20] The respondents had relied on O 11 r 1(h), (i) and (j) of the RHC which provide as follows:

Order 11 Service of Process, Etc, Out of the Jurisdiction

1 Principal cases in which service of notice of writ out of jurisdiction is permissible. (0.11 r. 1)

(1) Where the writ does not contain any claim for damage, loss of life or personal injury arising out of —

(i) a collision between ships; or

(ii) the carrying out of or omission to carry out a manoeuvre in the case of one or more of two or more ships; or

(iii) non-compliance on the part of one or more of two or more ships, with the collision regulations made under section 251 of the Merchant Shipping Ordinance 1952 [70/52],

service of a notice of a writ out of the jurisdiction is permissible with the leave of the Court in the following cases, that is to say —

(h) if the action begun by the writ is founded on a tort committed within the jurisdiction;

(i) if in the action begun by the writ an injunction is sought ordering the defendant to do or refrain from doing anything within the jurisdiction (whether or not damages are also claimed in respect of a failure to do or the doing of that thing);

(j) if the action begun by the writ being properly brought against a person duly served within the jurisdiction, a person out of the jurisdiction is a necessary or proper party thereto;

[21] The learned judicial commissioner found that all the provisions of O 11 r 1 relied on by the respondents applied to this case. His Lordship stated that he agreed with the principle expressed in the case of *American Express Bank* that where the defendant is not present in Malaysia and had not submitted to jurisdiction, the Malaysian court can have jurisdiction statutorily over a foreign defendant under O 11 r 1 of the RHC as jurisdiction is implicit in the power to grant leave for service out of jurisdiction (p 46 of appeal record). Learned counsel for the appellant submitted that the learned judicial commissioner erred in finding that the High Court was seised of jurisdiction based on O11 of the RHC. It is submitted that the substantive law that confers jurisdiction is s 23 of the CJA.

[22] For purpose of clarity, we reproduce the relevant part of the judgment of Peh Swee Chin SCJ which the learned judicial commissioner had referred to as follows:

If neither such a defendant can be served in this country, because he is not present here nor has he submitted to jurisdiction, then the Malaysian courts can *assume statutorily*, such *jurisdiction over the foreign defendant* under O 11 r 1 of the Rules of

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> the High Court 1980, (hereinafter called RHC) on the foreign defendant, as the *conferment of such jurisdiction is implicit in connection with the granting of leave* by the High Court for service out of jurisdiction etc. There is no need to go further in this case by referring to the relevant provisions of the Courts of Judicature Act 1964 etc for source or origin of such *statutory jurisdiction.* (emphasis added)

B

[23] From the above judgment it is apparent that in the context of O 11 r 1 of the RHC, 'jurisdiction' refers to jurisdiction over the foreign defendant and not jurisdiction over the claim, as learned counsel for the appellant suggested. Thus where the court, after having decided that it has jurisdiction over the subject matter but finds that the foreign defendant cannot be served in Malaysia because he is not present here and has not submitted to jurisdiction (like the appellant herein), in such circumstances the court is allowed to statutorily assume jurisdiction over the foreign defendant under O 11 r 1 of the RHC if the court is satisfied that any of the limbs under O 11 r 1 apply. As the jurisdiction is statutory, it is for this reason that Peh Swee Chin SCJ said 'There is no need to go further in this case by referring to the relevant provisions of the Courts of Judicature Act 1964 etc for source or origin of such statutory jurisdiction'. Thus viewed in the context of O 11 r 1 we are of the view that the learned judicial commissioner had not erred when His Lordship stated that 'the Malaysian Court can have jurisdiction statutorily over a foreign defendant under O 11 r 1 of the RHC as jurisdiction is implicit in the power to grant leave for service out of jurisdiction'.

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[24] It was submitted for the appellant that parties to the contract had agreed that the contract was subject to Sudanese law and the guarantee would be governed by and construed according to the laws of Sudan and that the surety had agreed to submit to the non-exclusive jurisdiction of the courts in Sudan (item No 8 of the guarantee).

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[25] In *Globus Shipping and Trading Co (Pte) Ltd v Taiping Textiles Sdn Bhd* [1976] 2 MLJ 154; [1976] 1 LNS 31 that was cited by the learned judicial commissioner, the plaintiff had its place of business in Kuala Lumpur. They had forwarding agents to act for them in Penang. The defendants were carriers for reward and had its principal place of business in Singapore but they had agents in Penang. The plaintiff's claim was for damages for breach of contract by the defendants as carriers of a cargo of cotton from Karachi to Penang. Counsel for the defendants took a preliminary objection that by reason of clause 3 of the bill of lading the court had no jurisdiction to hear the case. Clause 3 provided as follows:

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> Any dispute arising under the Bill of Lading shall be decided in the country where the carrier has his principal place of business and the law of such country shall apply.

Counsel for the plaintiff on the other hand submitted that the court had

jurisdiction to determine the claim on the ground that although the plaintiff was in Kuala Lumpur they had forwarding agents in Penang. The learned judge of the High Court was of the opinion that it was a proper case where the discretion should be exercised in favour of the plaintiff. The decision of the High Court was upheld by the Federal Court. In its judgment the Federal Court concluded as follows:

> It would seem abundantly clear from the authorities that where a cause of action in respect of any dispute in relation to a contract arises and is therefore properly within its jurisdiction, the court has a discretion whether or not to adjudicate upon the claim in the action even where the parties have agreed to refer such dispute to a foreign court, and that the question of jurisdiction is quite separate from the question of the proper law of the contract to be applied.

[26] In *American Express Bank*, under the foreign jurisdiction clauses in the agreements the bank customers had submitted to the jurisdiction of the Singapore courts, and both parties had chosen Singapore law as the law of their choice for the litigation. Peh Swee Chin SCJ said:

> It would be clear that, notwithstanding such clauses, a Malaysian court ie High Court below, could not be precluded simpliciter thereby from exercising the discretion, according to the doctrine of forum non conveniens, as to whether to hear the instant case or not …

Peh Swee Chin SCJ had also said, inter alia:

> To continue with our view, it is most important to bear in mind another vital principle, that even if there is such jurisdiction to deal with the case, at common law, a Malaysian court has still the discretion to decide whether to deal with it on the doctrine of forum non conveniens. If the court exercises its discretion accordingly eg. not to deal with the case, then as the case may be, it can either stay the proceedings against the foreign defendant or refuse to grant leave to issue and serve out of jurisdiction such a notice of writ of summons, or permit an application to set aside such leave when leave has already been granted in the absence of the foreign defendant in an ex parte application for such leave earlier.
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> … we are of the considered view that in all cases of either a defendant's application for stay of proceedings or a plaintiff's application for leave to serve out of jurisdiction under O 11 r 1 of the RHC, or for setting aside such leave, it will be obligatory for a Malaysian court to consider in any event, a most important factor ie whether 'it would be unjust to the plaintiff to confine him to remedies elsewhere'. It is indispensable when a Malaysian court considers all cases in connection with forum non conveniens. The most important factor described above does arise, of course, out of a great variety of factors that a Malaysian court ought to consider in applying the said doctrine; the prominent one being that whether any particular forum is one with which the action has the most real and substantial connection.

[27] The appellant herein, like the defendant foreign bank in *American*

Express Bank, had applied to set aside the leave granted ex parte earlier to the respondents to issue and serve the writ of summons out of jurisdiction. Therefore the High Court had the discretion to decide whether to hear the case. In making its decision the High Court is obliged to consider, based on the doctrine of *forum non conveniens*, whether it would be unjust to confine the respondents to remedies elsewhere.

Forum non conveniens

[28] In *Harrah's Operating Co Inc (Trading as Harrah's Casino Hotel Lake Tahoe & Bill's Lake Tahoe Casino) v Wu Yun Shya Josephine and another appeal* [2008] 4 MLJ 63; [2008] 5 CLJ 251 Suriyadi Halim Omar JCA (as His Lordship then was) said:

> This doctrine of forum non conveniens in a gist refers to the discretionary power of court to deciine jurisdiction when convenience of parties and ends of justice would be better served if action were brought and tried elsewhere. The phrase does not mean that the court before which the issue is being canvassed is not convenient but that some other court is more suitable (*Black's Law Dictionary*). *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 had accepted this doctrine which originated from Scotland when Lord Goffsaid:
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> … there is some other tribunal, having competent jurisdiction in which the case may be tried more suitably for the interests of all the parties and for the ends of justice.

[29] The respondents herein contended that the Malaysian court is the suitable or appropriate forum to try this action and that it would be unjust to compel the respondents to sue in Sudan. It was submitted that the court ought to consider the following matters in determining the proper forum:

(a) the guarantee that is the subject matter of this action was issued in Malaysia by the second defendant, a Malaysian company;

(b) the demand on the guarantee was made in Malaysia;

(c) the guarantee money sought to be restrained is within Malaysia;

(d) the second defendant's witness(es) are in Malaysia and most of the plaintiffs' witnesses are in Malaysia;

(e) the plaintiffs' witnesses do not want to go to Sudan to give evidence due to security and/or safety reasons;

(f) Sudan went through civil wars in recent years with loss of about 2m civilian lives and is described by UN as being unable to protect the life and property of its citizens;

(g) the guarantee money by its nature can be dissipated or transferred very

quickly, and in Sudan there is no equivalent of our RHC 1980, O 29 procedure for preservation of status quo in urgent cases. To require the plaintiffs to go to Sudan courts would cause injustice in that the very subject matter would become academic there:

Sudanese courts require all documents to be filed and used must be translated into Arabic language. As the project documents in this case are in English, such requirement of translation would involve much time and costs and also loss of accuracy. When the first defendant made a demand on 8 April 2010, the second defendant was about to make payment within several days. There was simply not enough time to go to Sudan to file any injunction cause there, as translation would take much longer time and booking a flight to go there would take about one week, by which time the guarantee money would already be released and any injunction suit would have become academic; and

(h) although the applicable law of contract is the Sudanese law, the Sudanese law of contract is not very different from Malaysian law of contract, and the Shariah principle applicable to Sudan are very much similar to Shariah principles applicable in Malaysia and also similar to equitable principles applied by the Malaysian civil courts. The Malaysian civil courts also handle civil cases involving Shariah principles, including banking cases on Shariah loans and facilities. From the Sudanese lawyers' legal opinion, the Sudanese law applicable to this action is clear, and can be readily applied by Malaysian court in this action.

[30] The learned judicial commissioner decided that in the interests of all parties and for the ends of justice this action should be tried in Malaysia. We agree with His Lordship. The facts show that although the instructions to make the demand originated from the appellant, the purported fraudulent and/or unconscionable demand was made in Malaysia at the second defendant's office in Malaysia. Both the respondents are in Malaysia. Accordingly we are of the view that the evidence from witnesses on the issues of fact would be more readily available in Malaysia thereby making a trial in Malaysia more convenient.

[31] We are unable to agree with the appellant that the second defendant ought not to be made a party in this action. We agree with the learned judicial commissioner that the declaratory orders sought against the second defendant would affect the rights of the appellant. In the circumstances we agree with the learned judicial commissioner that the second defendant is a necessary and proper party to this action. Further the second defendant had entered unconditional appearance and had not sought to strike out the respondents' claim.

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[32] The learned judicial commissioner had dismissed the appellant's application to set aside or alternatively to discontinue the ad interim injunction granted against the appellant pending the inter partes hearing on the ground that, at that stage, he was satisfied that there were serious questions for trial and a more mature consideration could be done at the inter partes stage.

Ad interim injunction

[33] It is trite that the court has jurisdiction whether or not to grant an ad interim injunction to preserve the status quo pending the inter partes hearing (*RIH Services (M) Sdn Bhd v Tanjung Tuan Hotel Sdn Bhd* [2002] 3 MLJ 1; [2002] 3 CLJ 83). In *Focal Asia Sdn Bhd & Anor v Raja Noraini bt Raja Datuk Nong Chik & Anor* [2009] MLJU 1688; [2009] 1 LNS 913 the plaintiffs applied for an injunction under s 11(1) of the Arbitration Act 2005 which empowers the High Court to make any order for securing an amount in dispute before or during arbitral proceedings as an interim measure. The sum in dispute was in part secured by an unconditional bank guarantee for the sum of RM10m procured by the second plaintiff in favour of the first defendant. Mohamad Ariff JC said:

> A demand guarantee or performance bond which is unconditional has first and foremost to be treated as subject to the well-established principle of autonomy of the document which must be kept separate from the underlying contract. The rule on payment upon a call is strict, subject only to the clear fraud exception, as discussed above. The bank has to pay if the call on the document is not fraudulent or is not based on a forged document. As between the immediate parties, namely the principal and the beneficiary, however, the law allows an extended exception to the autonomy principle. If there is clear evidence of fraud in the underlying contract, or unconscionability, the court can interfere. In these two situations, the integrity and autonomy of the document will not be compromised, since the paying bank will not be directly prevented from acting on the document. It is the beneficiary that is prevented from making a call on the document on these grounds. Nonetheless, the evidence allowing intervention by the court must be clear. I accept the test of 'seriously arguable that the only realistic inference is fraud' as good law in an interlocutory application …

His Lordship cited the Singapore Court of Appeal case of *Bocoltra Construction Pte Ltd & Ors v Attorney General (No 2)* [1995] 2 SLR 733 which accepted the legal position that the court will grant an interlocutory injunction restraining a beneficiary from calling on the bond on the ground of fraud or unconscionability. The court said that fraud or unconscionability is the sole consideration for the court in deciding whether an interlocutory injunction should be granted to restrain a beneficiary from calling on the bond. The court

need not expend energy to consider where the balance of convenience lies or whether damages will be an adequate remedy.

[34] In *Kejuruteraan Bintai Kindenko Sdn Bhd v Nam Fatt Construction Sdn Bhd & Anor* [2011] 7 CLJ 442 the Court of Appeal agreed with *Focal Asia* that the principle recognising unconscionability as a separate and distinct ground to restrain a beneficiary from making a call on a performance bond accorded with good commercial sense as the principle underlying the unconscionability doctrine is the prevention of oppression and unfair conduct. The Court of Appeal held, inter alia:

> A distinction must be drawn between an injunction to restrain a bank/issuer from making payment out on a performance bond (which is governed by the performance guarantee agreement) and an injunction to restrain a beneficiary from making a demand on the bond (which is governed by the underlying contract between the parties).

The Federal Court agreed with the Court of Appeal in *Sumatec Engineering And Construction Sdn Bhd v Malaysian Refining Co Sdn Bhd* [2012] 4 MLJ 1; [2012] 3 CLJ 401 and held that unconscionability may now be raised as a distinct ground to restrain a beneficiary under a bank guarantee or performance bond.

[35] In the present case the facts placed before the learned judicial commissioner at the ex parte stage were that the appellant had made calls on the guarantee despite parties being in negotiations for settlement and despite the fact that the JV had acceded to the appellant's request by asking for the guarantee to be renewed pending settlement negotiations. The respondents averred that the demand was made as a tool or means of oppression or vexation against the respondents and that in the circumstances of this case, a demand or claim of the appellant towards the guarantee would be fraudulent, unconscionable and/or invalid under the law. Based on the facts before the learned judicial commissioner, we are unable to find that His Lordship had erred in exercising his discretion not to set aside the ad interim injunction pending the hearing inter parte.

[36] For the reasons adumbrated above we dismissed both appeals with costs to the respondents.

Both appeals dismissed with costs.

Reported by Ibnu Aswan